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No. 02-1379

IN THE
SUPREME COURT OF THE UNITED STATES

CITY OF BURBANK,
Petitioner

v.

IRV RUBIN AND ROBERTO ALEJANDRO GANDARA,
Respondents.

On Petition For Writ of Certiorari to the
Court of Appeals of California, Second Appellate District,
Division Two

BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

John W. Whitehead
Steven H. Aden (Counsel of Record)
Rita M. Dunaway
THE RUTHERFORD INSTITUTE
112 Whitewood Road
Charlottesville, VA 22901
Tel.: (434) 978-3888

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QUESTIONS PRESENTED FOR REVIEW

The Burbank City Council has been enjoined from allowing "sectarian" prayers at any city council meeting, and has been ordered to advise individuals giving a legislative invocation at all meetings that "sectarian" prayers are not permitted. The following three questions are presented here:

1. Whether the allowance of a single or occasional "sectarian" prayer offered by citizen volunteers at a public meeting of a legislative body constitutes the "advancement" of a particular religious ideology by the legislative body, in violation of the Establishment Clause of the First Amendment to the United States Constitution and the Court's decision in *Marsh v. Chambers*, 463 U.S. 782 (1983)?

2. Does the legislative prayer practice dictated by the California courts – which now requires California legislative bodies to ascertain whether prayers in their meetings are "sectarian" and then ban such prayers under penalty of contempt – violate the Establishment Clause by impermissibly entangling government with religion?

3. Whether a legislative body, which is now required to determine whether a legislative prayer is "sectarian" and to prohibit any such "sectarian" prayer, engages in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment to the United States Constitution and this Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)?

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STATEMENT OF INTEREST OF *AMICUS CURIAE* AND INTRODUCTION[1]

The Rutherford Institute is a non-profit civil liberties organization with offices in Charlottesville, Virginia. John W. Whitehead founded the Institute in 1982. Its mission is to educate individuals about their civil liberties and to provide free legal representation to those whose constitutional rights are violated. Attorneys affiliated with the Institute have appeared as counsel before the Court in significant First Amendment cases, *e.g.*, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), and have filed *amicus curiae* briefs in numerous First Amendment cases.

The Rutherford Institute supports the Petitioner's request for a writ of certiorari because it regards the case as an opportunity for the Court to clarify vital issues of First Amendment jurisprudence that remain extant. Specifically, this case presents an opportunity for the Court to reiterate that private religious speech, even when it occurs in the public arena, does not violate the Establishment Clause, which precludes government actors from manifesting religious preferences. The case also presents an opportunity for the Court to correct the growing misconception that the Establishment

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent are on file with the clerk of the Court. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Clause is somehow less offended by non-sectarian prayer than by sectarian prayer.

SUMMARY OF ARGUMENT

This Court has consistently acknowledged that while the First Amendment precludes government actors (in their capacity as such) from manifesting religious preferences, it also provides a bulwark for the religious speech of private individuals. The Establishment Clause is not offended when private individuals engage in religious speech. To the contrary, the Free Speech and Free Exercise of Religion Clauses of the First Amendment protect this "private speech" from governmental censorship.

In this case, the California appellate court has committed a grievous error in holding that invocations delivered by private individuals at Burbank's City Council meetings violate the First Amendment's Establishment Clause. The holding rests on a startling proposition – that individuals are transformed into government actors merely by virtue of the fact that their speech occurs on government property and addresses a government entity that has allowed the speech to occur. While this aspect of the holding alone represents a marked departure from the Court's Establishment Clause jurisprudence, the error is compounded by the fact that the court below resolved the weighty issue before it without so much as a perfunctory application of this Court's venerable *Lemon* test.

The holding of the court below essentially forecloses the possibility that a private individual could ever deliver a sectarian prayer at the meeting of a city council or other deliberative body without creating an Establishment Clause violation. A juxtaposition

of the lower court's holding in this case with this Court's holding in *Marsh v. Chambers*, 463 U.S. 783 (1983), highlights the counterintuitive nature of the lower court's holding in this case. The Court's *amicus* fails to discern how the Establishment Clause could reasonably be interpreted to permit state legislatures to initiate and fund a practice of opening their sessions with invocations delivered by a pastor of a single Christian denomination, provided the prayer is non-sectarian, but not to permit private individuals to voluntarily deliver prayers at city council meetings unless the city council restricts the content of the prayers.

The Court's *amicus* respectfully submits that the censorship of private religious speech at city council meetings is not required by *Marsh v. Chambers*, is not indicated by this Court's Establishment Clause jurisprudence, and, in fact, turns the First Amendment on its head.

ARGUMENT

I. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE THE CALIFORNIA COURT'S HOLDING REPRESENTS A DRAMATIC DEPARTURE FROM THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE IN THAT IT SUBJECTS NON-GOVERNMENT SPEECH TO ESTABLISHMENT CLAUSE ANALYSIS OUTSIDE OF THE PUBLIC SCHOOL CONTEXT.

The Rutherford Institute respectfully submits that the central question in this case, as in all Establishment Clause cases, is whether the religious speech in question constitutes private speech or government speech. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment

Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clause protect." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000)(quoting *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)(plurality opinion)); *accord Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 841 (1995).

However, this question was clearly not primary to the California appellate court's analysis. At first the court avoided the question entirely. It stated:

> By directing the prayer to "our Father in Heaven ... in the name of Jesus Christ" the invocation conveyed the message that the Burbank City Council was a Christian body, and from this it could be inferred that the council was advancing a religious belief.... [W]e interpret *Marsh* to mean that any legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause. We therefore conclude that, in accordance with the holding in *Marsh*, the invocation offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions.

Rubin v. City of Burbank, 101 Cal.App.4th 1194, at 1204 (2000). This portion of the opinion reveals that the lower court has taken a giant logical leap from a determination that the invocation in question was Christian in nature to a determination that the City has violated the Establishment Clause. No discussion of whether the invocations constituted government speech or private speech preceded this conclusion or was indicated as forming its premise. The court has thus found an Establishment Clause violation based

on the type of prayer delivered (*i.e.*, sectarian) rather than the identity of the speaker or the role, if any, of the government entity in bringing about the invocation.

The court below proceeded to what should have been the heart of the Establishment Clause analysis only as it declared that the City would not be engaging in viewpoint-based discrimination or censorship by advising members of the public that sectarian prayers would not be permitted. *Id.* at 1206. In that portion of its opinion, the court purported to rely upon two school prayer cases in determining that the invocations delivered at City Council meetings did not constitute "private speech." *Id.* at 1206-07 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) and *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000)).

However, the court does not appear to have been truly convinced that the invocations were not private speech, and its actual analysis belies this pronouncement in several respects. First, while stating that the prayers were not private speech, the court was careful to never identify the invocations as "government speech." This phrase is conspicuously absent from the opinion, as the prayers presumably fall into one category or the other.

Second, the court stated:

> City correctly points out that "the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." But this does not create carte blanche for the speaker. Whether the trial court's order amounted to unconstitutional censorship or viewpoint discrimination depends on the nature of the speech involved

and the manner of restriction imposed.

Id. at 1206 (citations omitted).

This type of analysis is wholly inconsistent with the court's apparent determination that the invocations constitute government speech for purposes of Establishment Clause analysis. Where the government itself is the speaker, transmitting its own message, the First Amendment does not preclude it from making viewpoint-based decisions. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)). It is puzzling, then, that the court below declared the invocations to be something other than private speech, yet examined the restrictions that the trial court required the City Council to impose upon speakers under a strict scrutiny analysis. *Rubin*, 101 Cal. App. 4th at 1207.

The court's analysis points to the glaring fact, tacitly acknowledged by the court, that the invocations delivered voluntarily by private individuals at City Council meetings simply do not constitute "government speech" merely by virtue of the fact that they are allowed by the City and occur on government property. Because they do not constitute government speech, the prayers necessarily fall into the category of private speech and, thus, are not within the ambit of the First Amendment's Establishment Clause. Rather, they are protected by the Free Speech and Free Exercise clauses.

In reaching its conclusion that the invocations were not private speech, the court cited the following factors: (1) the City Council meeting took place on government property; (2) the invocations

were authorized by longstanding policy; (3) the invocations were included on the Council's agenda; and (4) the prayers called for spiritual assistance in the work of the Council. *Id.* at 1207.

It is unclear why the court considered these factors to be the touchstone of government speech. Factors one through three characterize any and all speech by City residents who attend the Council's meetings and take advantage of the opportunity provided for them to speak at various stages of the meetings. All such speech occurs on government property and is authorized by the Council's longstanding policy of designating particular portions of the meeting for public comment; these portions are designated on the City Council's official agenda.

With respect to the fourth factor, it is unclear why it is relevant in any way. Surely private speech is not converted to government speech by virtue of the fact that it is religious in nature. The court may have meant to emphasize that the invocations addressed the City Council specifically, but this factor also characterizes all or most comments by private individuals who speak out at the meetings.

According to the court's analysis, any speech by private individuals at City Council meetings constitutes "government speech." But this proposition is demonstrably untrue, for in that event the court has opened the door for City officials to silence any and all speakers at City Council meetings if it dislikes their viewpoint. *See Velazquez, supra; Southworth, supra*, 529 U.S. at 229; *Rosenberger, supra*, 515 U.S. at 833.

The Court's *amicus* respectfully submits that such a result cannot be countenanced by this Court. Speech at City Council

meetings by those members of the public who choose to actively participate in the workings of their local government constitutes private speech that is protected by the very core of the First Amendment. This is so whether the speech is religious or secular in nature.

II. THE CALIFORNIA APPELLATE COURT'S HOLDING REPRESENTS A SIGNIFICANT AND UNWARRANTED EXTENSION OF THIS COURT'S HOLDING IN *SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE*.

In announcing the four factors that led to its determination that the invocations at City Council meetings did not constitute private speech, the court below relied upon this Court's holding in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, and upon the Ninth Circuit's holding in *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092. The Court's *amicus* respectfully submits that the court's reliance upon these cases, both of which involved speeches delivered by high school students at school-sponsored events, is inappropriate. If the court's decision in this case is allowed to stand, it will operate as precedent for future holdings that erase the line between government speech and private speech for Establishment Clause purposes. The eventual result will be the elimination of private religious speech from the public sphere.

In *Santa Fe* itself, this Court cautioned that not all messages that are authorized by government policy and take place on government property at government-sponsored events constitute government speech. 530 U.S. at 302. In concluding that the invocations delivered by students at high school football games pursuant to a detailed school policy were, in effect, government speech, the Court relied heavily on two important factors. First, the

school allowed only one student to deliver the messages for an entire season. *Id.* at 303. Second, the Court pointed to the fact that school officials regulated the content and topic of each student's message. *Id.*

The absence of those factors clearly distinguishes *Santa Fe* from this case. Moreover, it is interesting to note that according to *Santa Fe* and other of this Court's Establishment Clause cases, the City of Burbank would actually move toward an Establishment Clause violation by complying with the lower court's order to inform participants that they may only deliver "non-sectarian" invocations. It is unacceptable for the government to endorse only "civic" or "non-sectarian" prayers because, at best, this narrows the number of people who object to the prayer and, at worst, increases their "sense of isolation and affront." *Id.* at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 594 (1992)). Accordingly, a reviewing court's function should be to determine whether the religious speech constitutes private speech or government speech in the first instance, rather than to order that any religious speech be diluted so as to render it "inoffensive."

The Rutherford Institute submits that the California appellate court's holding represents a dramatic extension of this Court's holding in *Santa Fe* because it applies *Santa Fe* to hold that religious speech loses its private character merely by virtue of the fact that it occurs on government property at a government-sponsored event. The court effectively jettisoned this Court's practice of analyzing the specific policy, if any, that resulted in religious speech and the extent of the government's involvement, if any, in determining or restricting the content of the speech. The Court's *amicus* respectfully submits that by divorcing the *Santa Fe* holding from these essential underlying elements of this Court's

analysis, the court below has extended *Santa Fe* in a manner that banishes private religious speech from the public sphere by commandeering it and labeling it non-private speech.

III. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE REVIEW WOULD ALLOW THE COURT TO CLARIFY THE PROPER PLACE OF *MARSH V. CHAMBERS* IN MODERN ESTABLISHMENT CLAUSE ANALYSIS OF CASES INVOLVING PRAYER AT GOVERNMENTAL DELIBERATIVE BODY MEETINGS.

While the Justices of this Court have at various times expressed their dissatisfaction with the test announced by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) as the proper standard for analysis of Establishment Clause questions, that standard has not been overruled. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395, n.7 (1993) ("[W]e return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case... presents no occasion to do so."). Because *Lemon* has not been overruled, The Rutherford Institute respectfully submits that lower courts are obligated to apply it in deciding Establishment Clause questions, notwithstanding that this Court may disregard it in certain instances.

The absence of the *Lemon* analysis in the lower court's opinion is more troubling because of the court's misapplication of this Court's holding in *Marsh*. Specifically, the court below appears to have determined that because it considered the case to be distinguishable from *Marsh* on its facts, the invocations delivered at the City Council meetings necessarily violated the Establishment Clause. The court stated:

> [W]e interpret *Marsh* to mean that any legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause. We therefore conclude that, in accordance with the holding in Marsh, the invocation offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions.

101 Cal.App. 4th at 1204.

The problem with this reasoning is that the *Marsh* Court did not, in fact, hold that any sectarian, proselytizing prayer delivered before a deliberative body violated the Establishment Clause. Rather, the Court in *Marsh* held that the invocations regularly delivered before the state legislature's sessions by a Presbyterian chaplain who was paid by the legislature did not violate the Establishment Clause. *Marsh*, 463 U.S. at 794. This is the converse of the lower court's holding in this case.

The Court's *amicus* respectfully submits that the court below erred in concluding that because the prayers in this case are factually distinguishable from those considered in *Marsh*, the inevitable result is an Establishment Clause violation. While the Court in *Marsh* alluded to the fact that the invocations actually delivered by the Presbyterian minister were non-sectarian, it did so in explaining that it was not necessary in that case for the Court to "embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 794-95. The court below has thus attributed to *Marsh* a holding that is not found in the Court's opinion. Upon determining the *Marsh* rule to be inapplicable because of factual distinctions, the proper course would have been for the court to apply the traditional *Lemon* test analysis. Pursuant

to that test, the invocations should have been upheld.

Lemon requires government policies to have a secular purpose, to have a primary effect that neither advances nor inhibits religion, and to avoid entangling government with religious matters. *Lemon*, 403 U.S. at 612-13. Here, the City's practice of allowing local volunteers to deliver invocations at City Council meetings has the secular purpose of allowing all City residents to participate in their local government's activities.

The primary effect of the practice is not to advance or inhibit religion, but rather to maintain a position of neutrality toward religion. This is so because the City's practice entailed no government choice of speakers and no government-imposed restrictions on the content of the individuals' speech. The mandate of the Establishment Clause is respected, not offended, by government policies of neutrality toward religious and secular speech. *See generally Widmar v. Vincent*, 454 U.S. 263 (1981) (declaring unconstitutional a university's policy of excluding religious groups from access to university buildings); *Good News Club*, 533 U.S. 98 (permitting religious club to meet on school premises on same terms as secular clubs would not violate Establishment Clause); *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990) (upholding federal Equal Access Act against Establishment Clause challenge).

Certainly the City's practice involved no entanglement of the government with religious matters. Indeed, it is the lower court's ruling, which requires the City Council to become involved in restricting the content of religious messages, that creates a serious entanglement problem. *See, e.g., Widmar*, 454 U.S. at 272, n.11 (observing that officials would pose a greater entanglement problem

by monitoring speech to exclude religious content than by permitting religious speech on the same terms as it permitted secular speech).

The issue that cannot be avoided in this case is that the distinction made by the court below between sectarian and non-sectarian prayer is not indicated by any of the tests applied by this Court in deciding Establishment Clause cases. Nor should it be a dispositive distinction. The Establishment Clause forbids the government to establish a "civic" religion just as it forbids it to establish an exclusive Christian one. *See Lee v. Weisman*, 505 U.S. at 590 ("The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."); *Board of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (noting that the principle at the heart of the Establishment Clause is that government may not prefer one religion to another, or religion to irreligion). The lower court's attempt to broaden the appeal of prayers delivered by private individuals at City Council meetings engenders the type of entanglement with religion that the Establishment Clause prohibits.

The Rutherford Institute respectfully submits that the court below has seriously undermined the First Amendment and this Court's Establishment Clause jurisprudence by misapplying the *Marsh* holding and by ordering a government entity to censor private religious speech.

CONCLUSION

The court below has entered a decision that essentially allows local government officials to censor any speech that occurs at government meetings on government property and requires them to censor religious speech that occurs under those circumstances. Rejecting this Court's longstanding Establishment Clause analysis, the California court concluded that the invocations delivered at City Council meetings were unconstitutional because their content may not be acceptable to every religious sect.

The Court's *amicus* respectfully submits that the lower court's novel form of Establishment Clause analysis turns the First Amendment on its head. The errors committed by the court below affect what is perhaps the most fundamental freedom of Americans – the freedom to engage in religious speech. The Rutherford Institute prays that the Court will grant certiorari to correct these grievous errors and thus ensure that the California court's holding may not be used to banish private religious speech from the public sphere.

Respectfully Submitted,

John W. Whitehead
Steven H. Aden (Counsel of Record)
Rita M. Dunaway
THE RUTHERFORD INSTITUTE
112 Whitewood Road
Charlottesville, VA 22906
Tel.: (434) 978-3888

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